

Item W06-01 Response Form

Title: **Appellate Procedure: Length of Briefs in Capital Cases** (amend Cal. Rules of Court, rule 36; adopt rule 36.1; and renumber rules 36.1–36.3)

- ☐ **Agree** with proposed changes
- ☐ **Agree** with proposed changes **if modified**
- ☐ **Do not agree** with proposed changes

Comments: _____

Name: _____ **Title:** _____

Organization: _____

☐ **Commenting on behalf of an organization**

Address: _____

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Please **write** or **fax** or **respond using the Internet** to:

Address: Ms. Romunda Price,
Judicial Council, 455 Golden Gate Avenue,
San Francisco, CA 94102
Fax: (415) 865-7664 **Attention:** Romunda Price
Internet: www.courtinfo.ca.gov/invitationstocomment

DEADLINE FOR COMMENT: 5:00 p.m., Monday, January 23, 2006
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Your comments may be written on this *Response Form* or directly on the proposal or as a letter. If you are not commenting directly on this sheet please remember to attach it to your comments for identification purposes.

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or the Rules and Projects Committee
All comments will become part of the public record of the council's action.*

Invitation to Comment W06-01

Title	Appellate Procedure: Length of Briefs in Capital Cases (amend Cal. Rules of Court, rule 36; adopt rule 36.1; and renumber rules 36.1–36.3)
Summary	This proposal would amend rule 36 and adopt new rule 36.1 to establish policies and procedures for requests to file over-length briefs in appeals from judgments of death.
Source	Appellate Advisory Committee Justice Kathryn Doi Todd, Chair
Staff	Joshua Weinstein, Committee Counsel, 415-865-7688, joshua.weinstein@jud.ca.gov
Discussion	<p>Rule 36 of the California Rules of Court addresses briefs in appeals from judgments of death. Subdivision (b) of this rule establishes limits on the length of these briefs. Under this rule, appellants' and respondents' opening briefs may be up to 95,200 words long (the equivalent of 280 pages), and appellants' reply briefs may be up to 47,600 words long (the equivalent of 140 pages). These limits are substantially higher than the 14,000-word (50-page) limit set by rule 14 for other appellate briefs.</p> <p>Although the higher limits set by rule 36 were established in recognition of the number, significance, and complexity of the issues presented in appeals from judgments of death, the rules also recognize that in some appeals counsel may not be able to prepare adequate briefs within those limits. Rule 36(b)(5) provides that the Chief Justice may, for good cause, permit a longer brief.</p> <p>Currently, rule 36 does not specify the factors that will be considered in determining whether good cause exists to grant an application to file an over-length brief, nor does it specify when a party must file such an application. Applications requesting permission to file an over-length brief now often are filed with the proposed over-length brief on the date that the brief is submitted for filing and often do not contain specific information about why a longer brief is needed in the case.</p> <p>Such applications place both the court and counsel in a difficult situation. Without information in the application about the circumstances necessitating additional briefing, the only way for the court to assess whether good cause exists for the over-length brief</p>

would be to read and analyze the brief and the record immediately upon submission for filing and well before receiving the respondent's brief and the reply brief. Denying the application would delay the appeal and burden counsel.

As a result, applications to file over-length briefs have been routinely granted. In the past 15 years, only one application—which sought to file a brief of more than 1,300 pages—was denied. Between the years 2000 and 2004, nearly 60 percent of appellants' opening briefs that were filed exceeded the limit stated in rule 36. The routine granting of these applications also may have diluted one benefit of limitations on the length of briefs—requiring counsel to focus and refine their arguments, thereby producing a more effective work product. The end result has been a large number of long briefs that strain the resources of both the court and counsel.

Proposed new rule 36.1,¹ which was developed with the assistance of representatives of both the capital defense and prosecution bar, is intended to address these difficulties by requiring parties to file applications for over-length briefs earlier in the case, clearly setting out the factors that will be considered in determining whether good cause exists for an over-length brief, and requiring parties to address these factors in their applications. This new rule is analogous to rule 45.5, which lays out the policies and factors governing extensions of time. Many of the factors listed in subdivision (c) of proposed rule 36.1 are similar to those considered by the courts in determining whether to grant an extension of time or in categorizing a case under the Supreme Court's fixed fee guidelines.

Under this proposal, an application to file an over-length appellant's opening brief must be filed within 90 days after the certified record is filed in the California Supreme Court, an application to file an over-length respondent's brief must be filed within 60 days after the appellant's opening brief is filed, and an application to file an over-length reply brief must be filed within 30 days after the respondent's brief is filed. In addition, the application itself must not exceed 5,100 words if produced on a computer or 15 pages if typewritten. The committee would particularly appreciate comments concerning whether these deadlines afford parties sufficient time before filing an application to analyze the issues that may be raised in the brief and whether the limit on the length of the application affords parties

¹ Current rules 36.1 through 36.3 would be renumbered to accommodate this new rule.

sufficient space to address the factors relevant to good cause.

The committee would also particularly appreciate comments concerning the brief limits established by rule 36. Although many briefs currently exceed these limits, the committee did not propose that the limits be changed. As noted above, between 2000 and 2004, only approximately 40 percent of appellants' opening briefs were within the limit set by rule 36. Approximately 80 percent of respondents' opening briefs were within the rule 36 limit. The committee believed, however, that the typical brief length would be reduced both by the implementation of this proposal and by the Supreme Court's recent clarification in *People v. Schmeck* ((2005) 37 Cal.4th 240, 303-304) regarding the extent of briefing required on issues previously considered and rejected by the Court. Almost 20 percent of appellants' briefs and 10 percent of respondents' briefs filed between 2000 and 2004 were within 17,000 words, or 50 pages, of the rule 36 limits and another 11 percent of appellants' briefs and 3 percent of respondents' briefs were within 34,000 words, or 100 pages, of these existing limits.

To give counsel an opportunity to prepare for these new requirements, proposed rule 36.1 would apply only to cases in which the record is filed with the Supreme Court after January 1, 2007.

Attachment

Rule 36 of the California Rules of Court would be amended; rule 36.1 would be adopted; and rules 36.1, 36.2, and 36.3 would be renumbered, effective January 1, 2007, to read:

Rule 36. Briefs

(a) * * *

(b) Length

(1) A brief produced on a computer must not exceed the following limits, including footnotes:

(A) Appellant's opening brief and respondent's brief: 95,200 words each.

(B) Reply brief: 47,600 words.

(C) Petition for rehearing and answer: 23,800 words each.

(2) A brief under (1) must include a certificate by appellate counsel stating the number of words in the brief; counsel may rely on the word count of the computer program used to prepare the brief.

(3) A typewritten brief must not exceed the following limits:

(A) Appellant's opening brief and respondent's brief: 280 pages each.

(B) Reply brief: 140 pages.

(C) Petition for rehearing and answer: 70 pages each.

(4) The tables, a certificate under (2), and any attachment permitted under rule 14(d) are excluded from the limits stated in (1) ~~or~~ and (3).

(5) On application, the Chief Justice may permit a longer brief for good cause. An application in any case in which the certified record is filed in the California Supreme Court on or after January 1, 2007, must comply with rule 36.1.

(c)–(h) * * *

1 **Rule 36.1. Applications to file over-length briefs in appeals from a judgment**
2 **of death**

3
4 **(a) Cases in which this rule applies**

5
6 This rule applies in appeals from a judgment of death in which the certified
7 record is filed in the California Supreme Court on or after January 1, 2007.
8

9 **(b) Policies**

- 10
11 (1) The brief limits set by rule 36 are substantially higher than for other
12 appellate briefs in recognition of the number, significance, and
13 complexity of the issues generally presented in appeals from judgments
14 of death and are designed to be sufficient to allow counsel to prepare
15 adequate briefs in the majority of such appeals.
16
17 (2) In a small proportion of such appeals, counsel may not be able to
18 prepare adequate briefs within the limits set by rule 36. In those cases,
19 necessary additional briefing will be permitted.
20
21 (3) A party may not file a brief that exceeds the limit set by rule 36 unless
22 the court finds good cause has been shown in an application filed within
23 the time limits set in (d).
24

25 **(c) Factors considered**

- 26
27 (1) The court will consider the following factors in determining whether
28 good cause exists to grant an application to file an appellant's opening
29 brief that exceeds the limit set by rule 36:
30
31 (A) The unusual length of the record. A party relying on this factor
32 must specify the length of each of the following components of the
33 record:
34
35 (i) The reporter's transcript;
36
37 (ii) The clerk's transcript; and
38
39 (iii) The portion of the clerk's transcript that is made up of juror
40 questionnaires
41

- 1 (B) The number of co-defendants in the case and whether they were
2 tried separately from the appellant;
3
4 (C) The number of homicide victims in the case and whether the
5 homicides occurred in more than one incident;
6
7 (D) The number of other crimes in the case and whether they occurred
8 in more than one incident;
9
10 (E) The number of rulings by the trial court on unusual, factually
11 intensive, or legally complex pretrial or trial motions that the party
12 may assert are erroneous and prejudicial;
13
14 (F) The number of rulings on objections by the trial court that the
15 party may assert are erroneous and prejudicial;
16
17 (G) The number and type of unusual, factually intensive, or legally
18 complex hearings held in the trial court that the party may assert
19 raise issues on appeal;
20
21 (H) The number of rulings by the trial court on factually intensive or
22 legally complex penalty phase motions that the party may assert
23 are erroneous and prejudicial; and
24
25 (I) Any other factor that is likely to contribute to an unusually high
26 number of issues or unusually complex issues on appeal. A party
27 relying on this factor must briefly specify those issues.
28
29 (2) In determining whether good cause exists to grant an application to file
30 a respondent's brief or a reply brief that exceeds the limit set by rule 36,
31 the court will consider, in addition to the factors listed in (1), the
32 authorized length of the appellant's opening brief or respondent's brief.
33

34 **(d) Time to file and contents of application**
35

- 36 (1) An application to file a brief that exceeds the limits set by rule 36 must
37 be served and filed as follows:
38
39 (A) For an appellant's opening brief, no later than 90 days following
40 the filing of the certified record in the Supreme Court.
41

1 (B) For a respondent's brief, no later than 60 days following the
2 filing of the appellant's opening brief.

3
4 (C) For an appellant's reply brief, no later than 30 days following
5 the filing of the respondent's brief.

6
7 (2) After the time specified in (1), an application to file a brief that exceeds
8 the applicable limit may be filed only under the following
9 circumstances:

10
11 (A) New authority substantially affects the issues presented in the case
12 and cannot be adequately addressed without exceeding the
13 applicable limit. Such an application must be filed within 30 days
14 of finality of the new authority; or

15
16 (B) Replacement counsel has been appointed to represent the appellant
17 and has determined that it is necessary to file a brief that exceeds
18 the applicable limit. Such an application generally must be filed
19 within 90 days after appointment of replacement counsel.

20
21 (3) The application must:

22
23 (A) State the number of additional words or typewritten pages
24 requested.

25
26 (B) State good cause for granting the additional words or pages
27 requested, consistent with the factors in (c). The number of
28 additional words or pages requested must be commensurate with
29 the good cause shown. The application must explain why the
30 factors identified demonstrate good cause in the particular case.
31 The application must not state mere conclusions or make legal
32 arguments regarding the merits of the issues on appeal.

33
34 (C) Not exceed 5,100 words if produced on a computer or 15 pages if
35 typewritten.

1 **Advisory Committee Comment**

2
3 **Subdivisions (a) and (d)(1).** In all cases in which a judgment of death was imposed after a trial
4 that began after January 1, 1997, the record filed with the Supreme Court will be the record that
5 has been certified for accuracy under rule 35.2. In cases in which a judgment of death was
6 imposed after a trial that began before January 1, 1997, the record filed with the Supreme Court
7 will be the certified record under rule 35.3.

8
9 **Subdivision (c)(1)(A).** As in guideline 8 of the Supreme Court's Guidelines for Fixed Fee
10 Appointments, juror questionnaires generally will not be taken into account in considering
11 whether the length of the record is unusual unless these questionnaires are relevant to an issue on
12 appeal. A record of 15,000 pages or less, excluding juror questionnaires, is not considered a
13 record of unusual length; 70 percent of the records in capital appeals filed between 2001 and
14 2004 were 15,000 pages or less, excluding juror questionnaires.

15
16 **Subdivision (c)(1)(E).** Examples of unusual, factually intensive, or legally complex pretrial
17 motions include motions to change venue, admit scientific evidence, or determine competency.

18
19 **Subdivisions (c)(1)(E) – (I).** Because, under this rule, an application must be filed well before
20 briefing is completed, the issues identified in the application will be those that the party
21 anticipates *may* be raised on appeal. If the party does not ultimately raise all of these issues on
22 appeal, the party is expected to have reduced the length of the brief accordingly.

23
24 **Subdivision (c)(1)(I).** Examples of unusual, factually intensive, or legally complex hearings
25 include jury composition proceedings and hearings to determine the defendant's competency or
26 sanity, whether the defendant is mentally retarded, and whether the defendant may represent
27 himself or herself.

28
29 **Subdivision (d)(3).** These requirements apply to applications filed under either (d)(1) or (d)(2).

30
31
32 **Rule ~~36.1.~~ 36.2. Transmitting exhibits; augmenting the record in the Supreme**
33 **Court**

34
35 * * *

36
37 **Rule ~~36.2.~~ 36.3. Oral argument and submission of the cause**

38
39 * * *

40
41 **Rule ~~36.3.~~ 36.4. Filing, finality, and modification of decision; rehearing;**
42 **remittitur**

43
44 * * *